

# The Commission back on the leash: no autonomy to sign non-binding agreements on behalf of the EU : Council v Commission

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# COMMON MARKET LAW REVIEW

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### **Aims**

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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## **The Commission back on the leash: No autonomy to sign non-binding agreements on behalf of the EU: *Council v. Commission***

Case C-660/13, *Council v. Commission*, judgment of the Court (Grand Chamber) of 28 July 2016, EU:C:2016:616

### **1. Introduction**

Can the Commission, pursuant to its prerogative of representing the Union externally, sign agreements on behalf of the Union without having received the explicit authorization of the Council? As this would run counter to Article 218 TFEU, this question can only be answered in the negative. But what if the agreement in question is a non-binding agreement? Does this in any way change the assessment? This question was put to the Court of Justice in the present case, where the Council for the first time challenged before the Court the Commission's practice of entering into non-binding agreements on behalf of the European Union. The Council asked for the annulment of the Commission decision of 3 October 2013 on the signature of an Addendum to the Memorandum of Understanding of 27 February 2006 on a Swiss financial contribution to the new Member States.<sup>1</sup> By bringing the Commission before the Court, the Council took action against a perceived increased tendency of the Commission to sign non-binding instruments containing EU policy commitments.<sup>2</sup>

This case is exemplary for the broader debate on the uncertain legal environment in which non-treaty agreements are concluded. In several jurisdictions, a distinction is made between important agreements requiring legislative approval on the one hand and less important agreements which may be ratified by the executive on the other hand.<sup>3</sup> Despite widespread use (by both EU and non-EU States as well as the EU itself), so-called “administrative agreements” are surrounded by legal ambiguity.<sup>4</sup> More specifically for the

1. Commission Decision C(2013)6355 final of 3 Oct. 2013.

2. Opinion of A.G. Sharpston in Case C-660/13, *Council v. Commission*, EU:C:2015:787, para 79.

3. Morrison, “Executive agreements”, *Max Planck Encyclopaedia of Public International Law* (2007).

4. Coman-Kund, *European Union Agencies as Global Actors: A Legal Study of the European Aviation Safety Agency, Frontex, and Europol* (Maastricht University Press, 2016), p. 147.

EU, this case raises important issues related to the institutional balance in the EU's external relations and the extent of the Commission's powers of representation: does the principle of institutional balance require that Article 218 TFEU is applied *mutatis mutandis* even where the article is not formally applicable? Is there a competence for the Commission under Article 17 TEU to conclude non-binding (administrative) agreements as long as the latter are in line with the policy set out by the (European) Council?

The earlier *France v. Commission* cases already provided clarification on the situation in which the Commission respectively concluded a binding international agreement on the EU's behalf and a non-binding international agreement committing only itself.<sup>5</sup> The case under discussion further completes the picture by embarking on the issue of non-binding agreements concluded by the Commission on behalf of the Union.

## 2. Context and main arguments of the parties

While Switzerland is not a member of the EU, it has access to the internal market based on a series of bilateral agreements.<sup>6</sup> Following the 2004 EU enlargement, Switzerland agreed to make a financial contribution to reduce economic and social disparities within the enlarged Union. To this effect it concluded a Memorandum of Understanding (MoU) with the EU in 2006.<sup>7</sup> Although it is not entirely clear from the MoU itself, the parties to it intended it to be a non-binding agreement.<sup>8</sup> Through the MoU the Swiss Confederation committed itself to concluding a series of bilateral agreements with the EU Member States that joined the Union in 2004, whereby those agreements "must be in conformity with the guidelines laid down in the Memorandum".<sup>9</sup> In their "hybrid" conclusions, the Council and the representatives of the Member States meeting in Council further agreed that the MoU would be signed, on the part of the EU, both by the Council Presidency and by the Commission.<sup>10</sup> A first addendum to the MoU, to include Bulgaria and Romania in the financial mechanism, was concluded in 2008 and signed by

5. Case C-327/91, *France v. Commission I*, EU:C:1994:305; Case C-233/02, *France v. Commission II*, EU:C:2004:173.

6. On these agreements, see Maresceau, "EU-Switzerland: *Quo vadis?*", 39 *Georgia Journal of International and Comparative Law* (2011), 729–737.

7. For the text of the MoU, see Conclusions of the Council of the EU and of the Representatives of the Governments of the Member States meeting within the Council on a financial contribution by the Swiss Confederation, 14 Feb. 2006, Doc. 6283/06.

8. See Opinion, para 32.

9. See Conclusions of 14 Feb. 2006, cited *supra* note 7, at 9.

10. *Ibid.*, at 3.

the same parties as the original MoU.<sup>11</sup> At the end of 2012 the Commission was again mandated by the Council, and the Member States meeting within the Council, to engage in the necessary negotiations on the adaptation of the Swiss financial contribution in light of the imminent EU accession of Croatia. However, unlike the previous addendum, the 2013 addendum was signed by the Commission alone, on behalf of the EU.

According to the Commission, the Council's 2012 conclusions constituted a political decision in the sense of Article 16 TEU,<sup>12</sup> allowing it not only to negotiate but also to conclude and sign the addendum with Switzerland. As a result, the Commission did not request the Council's (or the Member States') prior approval,<sup>13</sup> although it did keep the EFTA Working Party of the Council informed of the result of the negotiations. The legal basis cited by the Commission's decision was Article 17 TEU, which gives the Commission a general competence to represent the EU internationally and to perform coordinating, executive and management tasks.<sup>14</sup>

The Council applied for the annulment of the Decision based on two pleas in law. It claimed, first, that the Commission disrespected the distribution of powers between the Council and the Commission and therefore also the principle of institutional balance with regard to the approval and signature of a non-binding agreement between the Union and a third State. Second, according to the Council, the Commission's behaviour leading to the adoption of the contested decision as well as the signing of the 2013 Addendum violated the principle of mutual sincere cooperation. That this case was purely about procedure and not about the substance of the addendum was evidenced by the fact that the Council had requested the Court to order that the effects of the Decision be maintained until it is replaced.<sup>15</sup>

Pursuant to its first plea, the Council argued that the Commission acted *ultra vires* and infringed the principle of conferral and the institutional balance when it decided on the Union's position. The Commission allegedly did so by deciding unilaterally to treat the matter as falling under the Union's exclusive competence and to change the signatories of the 2013 addendum. By authorizing the signature of the 2013 addendum, it also accepted its content on

11. See Conclusions of the Council of the EU and of the Representatives of the Governments of the Member States meeting within the Council on an Addendum to the Memorandum of Understanding between the President of the Council of the EU and the Swiss Federal Council of 27 Feb. 2006, 5 May 2008, Doc. 8681/08.

12. Opinion, para 40.

13. Ibid., para 42. Since the Commission was of the opinion that the 2012 conclusions were Council conclusions (hybrid acts not being possible), it did not require the consent of the Member States in any case.

14. Opinion, para 41.

15. Ibid., paras. 5 and 53.

behalf of the Union.<sup>16</sup> The Council based its arguments on the 2004 *France v. Commission* case (*France v. Commission II*), dealing with the non-binding Guidelines on Regulatory Cooperation and Transparency concluded with the US.<sup>17</sup> In that case the Court ruled that “[d]etermining the conditions under which such a measure may be adopted requires that the division of powers and the institutional balance established by the Treaty in the field ... be duly taken into account”,<sup>18</sup> which is exactly what the Council reproached the Commission of not having done in the case under scrutiny. In *France v. Commission II*, the Court found the Guidelines non-binding, but immediately added that this did not make the Commission competent to conclude them. While the Court did exclude the application of what is currently Article 218 TFEU, it did not further establish the applicable procedure and the respective power(s) of the institutions.<sup>19</sup> Instead, it simply stated that in absence of any explicit provision on the issue in the Treaties, the institutions are required to respect the general division of powers and the institutional balance established by the Treaty.

In the present case, the Council submitted that the Commission, by not asking for prior authorization to sign the Addendum, infringed the Council’s policy-making prerogative and disregarded the role of the Member States.<sup>20</sup> According to the Council, Article 218 TFEU reflects the general distribution of powers under Articles 16 and 17 TEU, conferring on it, the Council, the power to define Union policy in external relations, implying that the Council authorizes negotiations *and* approves the international political commitments of the Union. The inapplicability *in casu* of Article 218 TFEU (since the addendum is not binding)<sup>21</sup> would therefore not preclude involvement of the Council. While the Commission generally represents the Union’s position, it cannot determine that position’s content. According to the Council, Article 17 TEU, the sole legal basis mentioned in the decision, does not grant the Commission the competence to authorize the contested signature without prior Council approval. The signing of an international agreement implies the Union’s acceptance of the agreement’s content, which cannot be predicted *ex ante* and therefore cannot be considered as being covered by an “established position”.<sup>22</sup>

16. *Ibid.*, para 90.

17. Case C-233/02, *France v. Commission II*, paras. 38–46.

18. *Ibid.*, para 40.

19. *Ibid.*, para 45.

20. Ramopoulos and Wouters, “Charting the legal landscape of EU external relations post-Lisbon”, Working Paper No. 156, *Leuven Centre for Global Governance Studies*, March 2015, at 14–15.

21. Neither of these elements were contested by the parties.

22. Opinion, paras. 89–91.



As mentioned, the Commission, by contrast, considered that the contested signature was no more than an act of external representation according to Article 17(1) TEU on a political position previously fixed by the Council and therefore did not require authorization by the Council. It relied in this on *Commission v. Sweden* where the Court found that it is not necessary for a common position to take a specific form in order for it to exist.<sup>23</sup> *In casu* the Commission put forward that the contested decision did not diverge from the Union's position on the financial contribution for Croatia set out in the 2012 Conclusions and that there had been no margin of discretion on the matter for the Commission during the negotiations. Recital 5 of the Addendum claims in this regard that the Addendum reflects the Union's position as expressed in the 2012 conclusions, in turn building on the 2006 MoU and 2008 Addendum. In line with that position, the contested decision mentions that the proposed Addendum reflects the Swiss political engagement to negotiate with Croatia an agreement on a financial contribution similar to what was decided for the previous beneficiaries and calculated in proportion to the original Swiss financial contribution without any financial implications for the EU budget.<sup>24</sup> The Commission therefore put forward that the Council wrongly advocated the *de facto* application of Article 218(3) and (5) TFEU.

### 3. Reasoning of the Advocate General

Before addressing the pleas put forward by the Council, Advocate General Sharpston pointed out that none of the parties addressed the issue of whether there was EU competence in the first place and whether an appropriate legal basis was present. According to the Advocate General these issues should normally be addressed first, but due to a lack of information, the Advocate General found that the Court was prevented from looking into them.<sup>25</sup>

The Advocate General remarked that the absence of specific procedures in the Treaties on certain forms of action is not a bar to using those instruments in the Union's external relations, as long as the division of powers and the institutional balance established by the Treaties in the relevant field are taken into account. She thereby recalled the Court's ruling in *France v. Commission II*.<sup>26</sup> The Advocate General added that while she had, in an earlier case, acknowledged that an analogous application of Article 218 TFEU would be possible in the absence of specific procedural rules for the adoption of

23. Case C-246/07, *Commission v. Sweden*, EU:C:2010:203, para 77.

24. Opinion, paras. 44 and 94–95.

25. *Ibid.*, paras. 76–77.

26. *Ibid.*, para 102.

unilaterally binding declarations,<sup>27</sup> she did not see a basis for that approach *in casu* precisely because of the Addendum's non-binding nature.<sup>28</sup>

The Advocate General then proceeded to address the first plea of the Council, i.e. the question whether the Commission exceeded its powers under Article 17 TEU and thereby encroached on the Council's powers under Article 16 TEU. At the centre of this issue is the question what constitutes policy-making. In this regard, the Advocate General noted that Union policy is adopted at the level of the European Council and Council, pursuant to Articles 15 and 16 TEU. Their prior intervention is needed for the Commission to know what Union policy to represent externally pursuant to Article 17 TEU. The Advocate General concurred with both the Commission and the Council that it is the Council who should decide whether the Union should initiate negotiations with a third State to reach agreement on a matter (related to) an area for which the Union is competent and to decide on the interests to be pursued.<sup>29</sup> Such policy-making then also includes, as was the case in the situation at hand, "the decision that an objective for which the Union is competent can be pursued by obtaining a commitment (whether or not binding) from a third State to pay a financial contribution to a new Member State pursuant to a future bilateral agreement between those two parties (assuming no such decision has been taken earlier) and thus by participating in external action, in the form of negotiations and possibly the subsequent conclusion of an instrument to obtain that commitment".<sup>30</sup>

The Advocate General countered the Commission's argument that the content of the final agreement corresponded to the negotiating mandate given by the Council, by finding that the Council is charged to verify the content of the agreement, the form of external action used, respect for relevant constraints, and to monitor the need for the Union to become a party to that agreement. The Council must decide whether the commitments made by the parties to the agreement contribute to the objectives pursued, whether they remain relevant, whether the Union is willing to accept them, and whether it agrees to the consequences international and EU law may attach to the external action. The Commission can therefore not disregard the Council's powers under Article 16(1) TEU to decide whether or not to become a party to an agreement such as the 2013 Addendum. The principle of tacit consent then does not apply to the Council's silence on the content of the 2013 Addendum, which in any event did not fully correspond to that of the 2012 conclusions.

27. See Opinion of A.G. Sharpston in Joined Cases C-103 & 165/12, *Parliament and Commission v. Council*, EU:C:2014:334, paras. 112 to 121 and 123; and Opinion of A.G. Cruz Villalón in Case C-399/12, *Germany v. Council*, EU:C:2014:289, paras. 101 to 114.

28. Opinion, para. 108.

29. *Ibid.*, paras. 104–105 and 108–110.

30. *Ibid.*, para 111.

The 2013 Addendum went beyond a mere clarification or application of existing commitments assumed under the 2006 MoU, and required a separate assessment of whether and under what conditions, a Swiss financial contribution was (still) needed in relation to Croatia. The executive and management functions which the Commission is entrusted with according to Article 17(1) TEU, and which it exercised in accordance with the 2006 MoU and the 2008 addendum, do not justify the Commission signing agreements in which those functions are confirmed.<sup>31</sup> According to the Advocate General, the choices and decisions made by the Commission during the negotiations of the 2013 Addendum needed to be approved by the Council as they went beyond the task of external representation and there was a margin of appreciation for the Commission. While the Council gave a considerable degree of discretion to the Commission to negotiate the agreement, it did not allow the Commission to decide on the appropriateness of the result or, consequently, to authorize the signature of the resulting addendum on behalf of the Union. Even if Switzerland set the amount of its financial contribution unilaterally, the Advocate General found that it was still for the Council to verify whether that amount was sufficient in view of the policy being pursued and the wider context of the conclusion of the 2013 Addendum.

The Advocate General, in conclusion, opined that the Commission had exceeded its powers under the Treaties, in particular Article 17 TEU, and encroached on the Council's prerogatives under Article 16 TEU.<sup>32</sup> She therefore addressed the Council's second plea only on the assumption that the first plea would be dismissed: assuming that the signing of the Addendum was an act of external representation coming under the Commission's mandate, had the Commission nevertheless flouted the principle of mutual sincere cooperation under Article 13(2) TEU? This principle is particularly important in the field of EU external action, due to the closely circumscribed process of concerted action and consultation between the EU institutions that it triggers.<sup>33</sup> The question thus firstly was whether the Commission had kept the Council adequately informed during the negotiations and leading up to the signature of the Addendum. Sincere cooperation presupposes good faith and active cooperation between institutions in the exercise of their own powers and those of others. The Advocate General found that the Commission had not acted sincerely, since it had only informed the Council of its decision one day before the signing, even though it was well aware of the fact that the relevant Council working party was proceeding on the understanding that the

31. *Ibid.*, paras. 113–116.

32. *Opinion*, paras. 100–101.

33. Case C-425/13, *Commission v. Council*, EU:C:2015:483, para 64.

Commission could not act autonomously.<sup>34</sup> Acting as such, the Commission rendered the principle of sincere cooperation ineffective as it made it impossible for the Council to purposefully contribute. The Advocate General nevertheless found that the plea was ineffective, since the Council had not shown how in absence of the infringement, the contested decision could have been substantially different. This would suggest that a violation of the principle of sincere cooperation does not amount to breaching a fundamental institutional rule in the sense of *Isoglucose*.<sup>35</sup>

#### 4. Judgment of the Court

If the length of a procedure is an indication of the complexity of the case, the Court *in casu* was faced with some very difficult questions: the proceedings were initiated in December 2013, but the Court only issued its judgment on 28 July 2016. As will be noted, the long-awaited judgment can be perceived as something of an anti-climax. The Court did not enter into the issue of admissibility (see further),<sup>36</sup> but immediately addressed the substance of the case.

With regard to the first plea, the Court began by stating the principle of conferral, further clarifying that Article 13(2) TEU constitutes a reflection of the principle of institutional balance.<sup>37</sup> Contrary to the Council, which claimed that Article 218 TFEU reflects the general distribution of powers under Articles 16 and 17 TEU,<sup>38</sup> the Court was silent on the application of Article 218 TFEU and its wider implications.

The Court then found the relevant powers to be the Council's policy-making power under Article 16(1) TEU and the Commission's external representation power under Article 17 TEU. The essence of the Court's analysis of the first plea revolved around the fact that the decision to sign (even a non-binding) agreement cannot be considered to come under Article 17 TEU, since it requires an assessment of the actual content of the agreement, more precisely whether it still reflects the Union's interests,

34. Opinion, para 135.

35. Case 138/79, *SA Roquette Frères v. Council of the European Communities (Isoglucose)*, EU:C:1980:249; see also Lenaerts, Maselis and Gutman, *EU Procedural Law* (OUP, 2014), p. 371.

36. As it did in *France v. Commission II*, where it dismissed the case on its merits finding that it did not have to rule on whether the Commission's decision to conclude a non-binding agreement with its US counterpart could be the subject of an action for annulment; see Case C-233/02, *France v. Commission II*, para 26.

37. Judgment, para 32.

38. Opinion, para 91.

something that cannot be determined in advance.<sup>39</sup> As a result, it constitutes the making of Union policy and therefore falls under Article 16 TFEU. The Court did not find its conclusion affected by the fact that the content of the Addendum (as negotiated) corresponded to the Council's original negotiating mandate.<sup>40</sup> The negotiation and the signing of an agreement indeed entail an assessment of the Union's interest on *two* different moments in time: even if the content of the Addendum corresponds to the negotiating mandate, the Union's interests may have changed in the meantime, and a second assessment is required. From this, the Court concluded that "the Commission cannot be regarded as having the right, by virtue of its power of external representation under Article 17(1) TEU, to sign a non-binding agreement resulting from negotiations conducted with a third country".<sup>41</sup> The Court added, however, that the 2012 Conclusions did not contain "any authorization empowering the Commission to sign the resulting addendum on behalf of the Union".<sup>42</sup> This may indicate that such an authorization could be contemplated by the Council (see further).

As a result, the Court found that "by signing the 2013 Addendum on behalf of the Union without the Council's prior approval, the Commission infringed the principle of distribution of powers in Article 13(2) TEU and the principle of institutional balance".<sup>43</sup> Upholding the first plea, the Court found it unnecessary to assess the second plea relating to breach of the principle of sincere cooperation.<sup>44</sup> At the request of the Council the Court further decided to maintain the effects of the contested decision.

## 5. Commentary

Some remarks can be made regarding the issues on which the Court has pronounced, but also on those which it failed to clarify. The brevity of the Court's decision may have resulted in an intelligible judgment, but it evidently also means that certain issues which merited the Court's attention, and for which practitioners would have welcomed further clarification, were (conveniently) glanced over. These issues relate to the admissibility of the action brought by the Council, the question as to the legal basis of the contested decision, the vertical competence (EU-Member State) question, and

39. Judgment, para 47.

40. Ibid., paras. 40–43.

41. Ibid., para 38.

42. Case C-233/02, *France v. Commission II*, para 37.

43. Judgment, para 46.

44. Ibid., para 48.

the issue of Article 218 TFEU as a reflection of the institutional balance in external relations.

5.1. *The decision of the Court: The Council remains in the driver's seat*

Does the Commission's power of external representation allow it to enter into non-binding agreements that do not deviate from existing EU policy? The Court answers with a resounding "no" and explicitly remarks that the non-binding nature of the agreement is immaterial in this regard.

*Council v. Commission* thereby completes the *France v. Commission* cases and confirms again that the Commission has a limited autonomous role in the EU's external relations. It may be recalled here that in *France v. Commission I* the Court rejected the idea that the Commission could conclude *binding* administrative agreements on behalf of the EU. In *France v. Commission II* the Court found that the Guidelines concluded between the Commission and US authorities were non-binding and that therefore Article 218 TFEU did not apply. It added, however, that this did not mean that the institutional balance in the Common Commercial Policy could be disregarded. Still, since the Guidelines were embedded in the EU-US policy (as defined by the Council in the Transatlantic Economic Partnership and the Action Plan), the Court did not find a violation of the institutional balance. In the present case, the Commission had also entered into a non-binding agreement and this, differently from *France v. Commission II*, was clearly on behalf of the Union. Since the Commission claimed that it had this power under Article 17 TEU, the Court looked into the relation between Articles 16 and 17 TEU.

Given the length of time it took the Court to come to its decision it is remarkable that the judgment only solves the very issue brought before it in a minimalist way without really engaging with the reasoning of the parties. While some would argue that this is how judges should decide cases, the law-making role that the Court fulfils in the EU may also make a more elaborate approach appropriate, in order to increase future process-efficiency. Further, while the Court's minimalist approach could be justified by arguing that the Court cannot be expected to give general guidance in the context of an action for annulment, it should be stressed that the Court itself introduced ambiguity in its ruling by suggesting, even though none of the parties raised this issue, the possibility of an *ex ante* Council delegation. The latter however would appear inconsistent with the central reasoning of the judgment, namely that an assessment of the Union's interests should take place both at the start (negotiating mandate) and at the end (signing of the agreement) of international negotiations.

The take home message in this case is that, absent a specific framework, any commitment on behalf of the EU (whether binding or not) can only be entered into following a procedure which respects the (undefined, see below) institutional balance. The obvious risk in this is that it may stifle the efficiency and effectiveness of the EU's external action. The alternative is that the Council may still tolerate autonomous Commission action but that it now also has a big stick in reserve to exclude such Commission action in areas deemed too sensitive. Time will tell whether the efficiency of EU external action will suffer or whether the institutions will find a workable *modus vivendi*.

## 5.2. Some loose ends

### 5.2.1. Admissibility

It is not the first time in recent external relations litigation that the Court has avoided the question of characterizing the contested act and elaborating on the admissibility of an action.<sup>45</sup> While the Commission did not raise the issue of admissibility, the Advocate General opined that it had to be addressed, although it is not entirely clear from her Opinion on what grounds she ultimately held the action admissible.

Admissibility under Article 263 TFEU *inter alia* requires a contested act to produce legal effects.<sup>46</sup> But how can one challenge the decision to sign a non-binding agreement under Article 263 TFEU? After having presented the idiosyncrasies of the legal effects of EU acts in international matters,<sup>47</sup> Advocate General Sharpston remarked that “[a]ctions under Article 263 TFEU can be brought on grounds of, *inter alia*, lack of competence. Regardless of whether or not an act itself has legal effects, the fact that one institution has taken it whereas the Treaties give powers to do so to another institution means that the act of taking the decision has legal effects (by usurping the powers of the second institution)”.<sup>48</sup> This would indeed be a compelling ground to hold the action admissible. After all, that an agreement is non-binding under international law does not automatically mean that the internal decision by which that agreement is concluded or signed does not produce legal effects within the internal (EU) legal order. Although the General Court has previously stated that “any act of a Community institution ... carries an incidental implication that the institution in question has adopted a position as to its competence to adopt them. The adoption of such a position cannot, however, be viewed as a binding legal effect for the

45. See e.g. Case C-73/14, *Council v. Commission*, EU:C:2015:663.

46. See Lenaerts, Maselis and Gutman, op. cit. *supra* note 35, pp. 268 et seq.

47. Opinion, para 61.

48. Ibid., para 62.



purposes of Article [263 TFEU], as interpreted in the case law”,<sup>49</sup> this admissibility requirement may have to be interpreted differently depending on whether privileged or non-privileged parties bring proceedings.

However, instead of simply accepting the admissibility of the case on this ground, the Advocate General further explored the issue, confusing it by doing so. The Advocate General remarked that, even if the addendum is non-binding, it formed the basis for a third State to initiate a parliamentary process leading to a binding agreement with a new EU Member State. Through the Commission’s signature then “the Union ... became bound by any consequences which international law may attach to that signature and to the relations between parties to a non-binding agreement”.<sup>50</sup> Unfortunately the Advocate General did not enter into which consequences those might be. She did continue, however, by remarking that the contested decision and the addendum “also produce legal effects *vis-à-vis* other EU institutions and the Member States”<sup>51</sup> likely because of the unity in the Union’s external representation and the principle of sincere cooperation which requires the Member States (and EU institutions) to cooperate to achieve the EU’s objectives and to abstain from undermining EU external action.

However, it would seem ill-advised if the admissibility of the action were to be based on these two last grounds, as this would result in legal uncertainty: admissibility would either depend on which consequences international law might attach to a certain action or it would first require an analysis of how an EU action affects the Member States’ freedom of movement on the international plane. It is regrettable that the Court did not pick up on this issue as it concerns questions regarding the legal qualification of EU external action instruments that have appeared in case law before.<sup>52</sup>

Instead, the more straightforward and neater solution would be to accept that the adoption by an EU institution of an external position (even if it is non-binding) as to its competence in a certain matter produces (sufficient) legal effects for the other institutions and the Member States to challenge that *prise de position*.

49. Joined Cases T-377, 379, 380/00 and 260 & 272/01, *Phillip Morris International v. Commission*, EU:T:2003:6, para 86.

50. Opinion, para 70.

51. *Ibid.*, para 71 (emphasis added).

52. See e.g. Opinion 1/13, EU:C:2014:2303; Case C-399/12, *Germany v. Council*, EU:C:2014:2258 (*Vine and Wine* case). See also Govaere, “Setting the international scene: EU external competence and procedures post-Lisbon revisited in the light of ECJ Opinion 1/13”, 52 CML Rev. (2015), 1277–1308; Govaere, “Novel issues pertaining to EU Member States membership of other international organisations: The *OIV* case” in Govaere et al. (Eds.), *The European Union in the World: Essays in Honour of Marc Maresceau*, pp. 225–243.



### 5.2.2. *EU or Member State competence?*

In its arguments, the Council did not only claim that the Commission had violated the horizontal distribution of powers, it also argued that “the Commission [had] disregarded the competence of the Member States and thus breached the principle of conferral under Article 4(1) TEU”.<sup>53</sup> It should be recalled here that the Council’s decision authorizing the Commission to negotiate the addendum with Switzerland was a hybrid act: the 2012 Conclusions of the Council of the European Union and of the Representatives of the Governments of the Member States meeting within the Council.<sup>54</sup>

Evidently this meant that when the Commission arrogated to itself the power to sign the agreement on behalf of the EU, it also denied the Member States’ competence in this matter. This was indeed the position of the Commission which had made note that it regarded the 2012 Conclusions as a decision of the Council, not of the Member States.<sup>55</sup>

Strangely enough, the Council did not raise an infringement of the (vertical) principle of conferral as a separate plea; but even if it had, the Court would probably still have solved the case based on the plea invoking the violation of the institutional balance. Otherwise, the Court would have had to deal with the question whether the addendum came wholly under the EU’s (exclusive or shared) competence or whether it also comprised exclusive national competences. In support of the latter, the Council invoked the following elements: (i) the Swiss financial contribution (“SFC”) comprises contributions from Switzerland to EU Member States, (ii) the SFC finds its legal expression in bilateral agreements between Switzerland and those Member States, (iii) not all Member States benefit from the SFC, (iv) the Swiss contributions are not channelled through the EU budget but go directly to the beneficiary Member States.

The difficult question here would then have been how the non-binding nature of the addendum might have affected the assessment. Given that the addendum gave expression to an understanding between the EU (and its Member States?) and Switzerland, was it not sufficient that it contributed to the principles and objectives enumerated in Article 21 TEU? Did it really

53. Opinion, para 82.

54. Another question which was not dealt with by the Court, was whether this original hybrid act was illegal. After all, in the earlier Case C-28/12, *Commission v. Council*, the Court declared illegal the practice of adopting hybrid acts (single decisions adopted by the Council and the Member States) insofar as such an act brings together two (or more) decisions that are subject to different procedures; see Case C-28/12, *Commission v. Council*, EU:C:2015:282 para 52. Dealing with this issue *in casu* would of course have required the precise procedure for the adoption of non-binding agreements to be identified (given that Art. 218 TFEU does not apply as such).

55. Opinion, para 40.

require the involvement of the Member States,<sup>56</sup> given that it was in any event non-binding and that the binding commitments would be entered into by the Member States without the EU?

### 5.2.3. *Legal basis*

The latter question links up with a further contentious issue which the Court did not enter into and which actually precedes the question of the nature of the EU's competence, i.e. the existence of the EU's competence. In this regard, the Commission had argued that the contested decision, which mentioned Article 17(1) TEU as its legal basis, did not need to refer to a material legal basis given that it was non-binding.

The repercussions of such an argument should be clear in light of the previous issue: the purpose of identifying the legal basis of an EU action is precisely to allow the EU to act in accordance with *inter alia* the principle of conferral. Arguing that a legal basis is not required, because the act is non-binding, amounts to arguing that no EU competence needs to be shown – which may further be translated conveniently into concluding that the EU may act to the exclusion of the Member States (cf. above).

As a matter of principle, such reasoning should be rejected and the Court might have dealt with it similarly as in *France v. Commission II*, in which it noted that the non-binding nature of the Guidelines did not confer a competence on the Commission to adopt them. Instead, “[d]etermining the conditions under which such a measure may be adopted requires that the division of powers and the institutional balance established by the Treaty ... be duly taken into account”.<sup>57</sup> Evidently the same approach should be followed when the competence of the Union (instead of that of an institution) is at issue.

### 5.2.4. *Article 218 TFEU as the reflection of the institutional balance in external relations*

The Court did not express itself on whether the procedure set out in Article 218 TFEU should be applied *mutatis mutandis* when non-binding agreements are concluded on behalf of the EU. This is regrettable. What is, for instance, the role of the European Parliament in all this? If the Court's ruling should

56. The involvement of the Member States is legally necessary if an agreement touches on exclusive national competences, or it may be politically preferable for the Member States to be parties to an agreement even if the latter wholly comes under the EU's shared competence and could therefore be concluded by the EU alone. The Court also accepted mixity in the latter situation. For a critique, see Timmermans, “The Court of Justice and mixed agreements” in Rosas et al. (Eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (Asser Press, 2013), p. 665.

57. Case C-233/02, *France v. Commission II*, para 40.

be interpreted as confirming Article 218 TFEU as the “default” provision for the EU’s external relations or as the *lex generalis* in this area, this would evidently be beneficial to the Parliament. The Court did not explicitly apply an institutional balance test, but seems to have effectively followed up on the suggestion of the Council, which had claimed that Article 218 TFEU reflects Articles 16 and 17 TEU specifically in the EU’s external relations. While the Court did not refer to Article 218 TFEU itself, it did apply part of the institutional balance enshrined in that Article: Council mandates, Commission negotiates and Council approves.

At the same time, the procedure set out in Article 218 TFEU appears rather unwieldy for the purpose of concluding technical and/or non-binding agreements of limited importance. One option to allow for a functional external action then is to rely on a *lex specialis* prescribing a “light” procedure.<sup>58</sup> A suggestion to this end may be read in the Court’s discussion of the 2012 Council Conclusions since it noted, in a rather clear way in different language versions of the decision, that the Conclusions did not contain an authorization to sign the addendum and that the Commission had not put forward any evidence showing the Council had intended to do so in its Conclusions.<sup>59</sup> It might therefore be inferred from the judgment that the Council could have granted such a power to the Commission in its Conclusions.

Since “the Commission cannot be regarded as having the right ... to sign a non-binding agreement resulting from negotiations conducted with a third country”,<sup>60</sup> might the Court accept such a power on the part of the Commission if it were delegated to it *beforehand* by the Council? While Article 218(5) TFEU evidently allows the Council to authorize the signing of an agreement, it presupposes that the authorization follows the negotiations instead of preceding it. This also seems to be the understanding of the Council Legal Service.<sup>61</sup> Drawing an analogy with “executive agreements” in the US, which may be concluded by the President without the Senate’s approval, this would mean that the Court again denied the existence of one type of executive agreement, while leaving the door open to another: in the US, executive

58. Art. 216 TFEU e.g. provides that “Union may conclude an agreement ... where the conclusion ... is provided for in a legally binding Union act”, which could allow the institutions to establish a specific procedure for the conclusion of such an agreement in the “legally binding Union act”. We would like to thank Andrea Ott for pointing our attention to this.

59. Judgment, para 37.

60. Ibid., para 38.

61. See Council Legal Service Opinion on the procedure to be followed for the conclusion by the EU of Memoranda of Understanding, Joint Statements and other texts containing policy commitments, with third countries and international organizations, Brussels, 1 Feb. 2013, Doc. No. 5707/13, para 12.

agreements may be solely presidential (without Congress' involvement) but they may also be concluded by the President acting pursuant to a congressional delegation.<sup>62</sup> By analogy then, the EU legal order does not recognize purely autonomous Commission agreements (binding on the EU), but it might accept autonomous Commission agreements adopted pursuant to a legislative mandate.

It is worth mentioning that there are some occasions on which the Council has, in a single decision, authorized a Member State and/or the Commission to both negotiate and conclude an agreement on behalf of the Union.<sup>63</sup> Could these techniques be seen as an application of Article 216 TFEU, which allows the Union to enter into international agreements when this is provided for in a legally binding Union act?<sup>64</sup> If so, what then is the potential of Article 216 TFEU as a *lex specialis* to depart from the *lex generalis* contained in Article 218 TFEU?

## 6. Concluding remarks

The Court agreed with the Council that by adopting the contested decision, the Commission had violated the principle of institutional balance.<sup>65</sup> However, the Court's decision does not provide the level of guidance it could have. Since the Court *inter alia* refused to recognize explicitly that the institutional balance as laid down in Article 218 TFEU reflects the inter-institutional

62. See Arnold, "Executive agreements in the aftermath of *Weinberger v. Rossi*: Undermining the constitutional treaty-making power", 6 *Fordham International Law Journal* (1982), 642.

63. See e.g. Council Decision 1999/97/EC of 31 Dec. 1998 on the position to be taken by the Community regarding an agreement concerning the monetary relations with the Republic of San Marino, O.J. 1999, L 30/33, resulting in the Monetary Agreement between the Italian Republic, on behalf of the EC, and the Republic of San Marino, O.J. 2001, C 209/1; and Council Decision 2009/904/EC of 26 Nov. 2009 on the position to be taken by the EC regarding the renegotiation of the Monetary Agreement with the Republic of San Marino, O.J. 2009, L 322/12.

64. We would like to thank Andrea Ott for drawing our attention to the general potential of Art. 216 TFEU in this respect.

65. Again, however, as has become customary in inter-institutional conflicts before the Court, the Court did not actually rely on the principle of institutional balance. Instead it simply held that Art. 17 TEU did not confer the contested power on the Commission and that the Commission had stepped on the Council's prerogatives under Art. 16 TEU. To come to this conclusion it did not need to, and indeed did not, apply an institutional balance test. This would again confirm that there is no self-standing *principle* of institutional balance and that it is instead a shorthand for the many Treaty provisions defining the inter-institutional relations (in casu Arts. 16 and 17 TEU). On this problematic nature of the principle of institutional balance, see Chamon, "The institutional balance, an ill-fated principle of EU law?", 21 *EPL* (2015), 371–392.

relations in the field of external relations and should therefore be applied by analogy to any situation not expressly covered by another Treaty provision.

This raises the question of how the Court's decision affects the existing institutional practice in the EU's external relations. The Council brought proceedings as a test case in light of what it qualified as an increased Commission tendency to sign MoUs on behalf of the EU without Council approval.<sup>66</sup> The Court's decision will now have put a halt to this practice, but it does not provide the guidance some had hoped for in relation to the Commission's practice, for instance in the field of competition law,<sup>67</sup> of concluding MoUs on its own behalf in line with *France v. Commission II*. This case leaves open the question to which extent the institutions might have recourse to the technique of legislative delegation in order to safeguard the effectiveness of EU external action. The rather heavy procedure of Article 218 TFEU was drafted with proper international agreements in mind, but it is unsuited for the conclusion of mere technical agreements. Such agreements do not require the same level of political investment.

Valerie Demedts and Merijn Chamon \*

66. See Council Legal Service Opinion of 1 Feb. 2013, cited *supra* note 61, para 1.

67. See <[ec.europa.eu/competition/international/bilateral/](http://ec.europa.eu/competition/international/bilateral/)> (last accessed 16 Aug. 2016).

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